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Supreme Court, U.S.
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No. 02-257

IN THE

Supreme Court of the United States

ANNA LLOYD,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

RANDAL ROBERT CRAFT, JR.
Counsel of Record
ALAN DAVID REITZFELD
JOANNA L. GERAGHTY
HOLLAND & KNIGHT LLP
195 Broadway
New York, NY 10007
(212) 513-3200

GEORGE LUCAS ASHLEY
JOHN HARRIS MARTIN
THOMPSON & KNIGHT LLP
1700 Pacific Avenue
Suite 3300
Dallas, TX 75201
(214) 969-1700

Attorneys for Respondent

176262

COUNSEL PRESS
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QUESTION PRESENTED

Whether a passenger suing an air carrier under the Warsaw Convention can recover for mental injuries that are accompanied by physical injuries.

STATEMENT PURSUANT TO RULE 29.6

Respondent American Airlines, Inc. ("American") is a wholly owned subsidiary of AMR Corporation, which is publicly traded.

TABLE OF CONTENTS

Page

Question Presented i

Statement Pursuant to Rule 29.6 ii

Table of Contents iii

Table of Cited Authorities v

Statement of the Case 1

Reasons for Denying the Petition 3

1. The Ruling Below Does Not Conflict with Existing Supreme Court Precedent 3

   A. *Floyd* holds that mental injuries alone are not recoverable under the Warsaw Convention 4

   B. *Zicherman's* choice-of-law analysis is inapplicable to Article 17 liability issues 7

2. The Decision Below Does Not Conflict with the Decision of Any Other United States Court of Appeals and, on a Related Issue, Is Consistent with Every Circuit that Has Addressed that Issue 13

Contents

Page

3. Review Is Not Necessary to Complete the Framework for Recovery of Mental Injuries under the Warsaw Convention, and the Question Presented Is Not One of Substantial Importance Warranting Consideration 14

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

Air France v. Saks,
470 U.S. 392 (1985) 6, 15

Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.,
389 U.S. 327 (1967) 15

Carey v. United Airlines,
255 F.3d 1044 (9th Cir. 2001) 9, 13

Chan v. Korean Air Lines, Ltd.,
490 U.S. 122 (1989) 14

Dazo v. Globe Airport Sec. Servs.,
268 F.3d 671 (9th Cir. 2001) 9

Eastern Airlines, Inc. v. Floyd,
499 U.S. 530 (1991) ..... *passim*

Ehrlich v. American Airlines, Inc.,
No. 99-CV-6013, slip op. at 8 (E.D.N.Y. June 21, 2002) 13

EL AL Israel Airlines, Ltd. v. Tseng,
525 U.S. 155 (1999) ..... *passim*

Fishman v. Delta Air Lines, Inc.,
132 F.3d 138 (2d Cir. 1998) 9

Cited Authorities

Page

In re Air Crash Off Point Mugu, Cal., on Jan. 30, 2000, 145 F. Supp. 2d 1156 (N.D. Cal. 2001) 9

In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988, 928 F.2d 1267 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) 12

In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) 9, 15

Terrafranca v. Virgin Atlantic Airways, Ltd., 151 F.3d 108 (3d Cir. 1998) 13

Wallace v. Korean Air, 214 F.3d 293 (2d Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001) 14-15

Zicherman v. Korean Air Lines Co., 516 U.S. 217 (1996) ..... *passim*

Cited Authorities

Page

Treaties, Statutes:

49 U.S. Stat. 3018 ..... *passim*

Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland on October 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in note following* 49 U.S.C.A. § 40105 (1997) ..... *passim*

Rule:

U.S. Supreme Court Rule 10(a) 14

Other Authorities:

Andreas F. Lowenfeld & Allen I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967) 12

Ark. Model Jury Instructions Civil 501 (4th ed. 1999) 2

STATEMENT OF THE CASE

The following facts were misstated or omitted by Petitioner Anna Lloyd ("Lloyd") in her statement of the case:[1]

Lloyd's exclusive cause of action for injuries sustained in the American Flight 1420 accident on June 1, 1999 arises under the Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland on October 12, 1929 (the "Warsaw Convention"), 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in note following* 49 U.S.C.A. § 40105 (1997), because her flight was part of international transportation. Pet. App. at 2a.

As a result of the accident, Lloyd suffered a puncture wound to her leg, traumatic quadriceps tendinitis, and smoke inhalation. Pet. App. at 3a.[2] She was treated at a hospital on the night of the accident and released that same night. *Id.* All of those physical injuries "have in the main, subsided." T. 470.

Nearly nine months after the accident, and at the request of her attorney, Lloyd scheduled an appointment with a psychiatrist, who diagnosed her as having Post Traumatic Stress Disorder ("PTSD"). Pet. App. at 4a. Although her psychiatrist initially testified that the physical injury to

1. Citation to the Petition for a Writ of Certiorari ("Petition") will be "Pet." and citation to the appendices to the Petition will be "Pet. App." Citation to the trial transcript will be "T."

2. Lloyd's description of the accident is riddled with hyperbole and exaggeration but will not be addressed here because it has no bearing on the question presented.

Lloyd's legs was a "factor" in her PTSD, he later admitted that "she would have had PTSD without the knee injury." *Id.*; T. 364-65.[3]

Lloyd has never been hospitalized for psychological reasons. T. 474. In fact, after the accident she went on to excel in school and earned a higher grade point average for the semester after the accident than for the one before the accident; she rejoined all of her school choirs; and she had nearly completed her college degree at the time of trial. Pet. App. at 4a; T. 369-71, 377-78, 474. Between the time of the accident and trial, Lloyd traveled on three out-of-town trips with the Ouachita Singers, including a trip to the Cotton Bowl game. T. 375. She will be eligible for student teaching once she completes the course she was taking at the time of trial (T. 232-33, 238), and she intends to complete her degree. T. 377-78.[4]

The Eighth Circuit held that "emotional damages are recoverable under the Convention to the extent that they are caused by physical injuries suffered in the accident," and, in so holding, the Eighth Circuit noted that "some of her [Lloyd's] emotional trauma can be traced to those injuries,

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3. That admission precludes the knee injury from being considered a proximate cause of the PTSD under Arkansas law. *See* Ark. Model Jury Instructions Civil 501 (4th ed. 1999) (to be a proximate cause, a factor must be "a cause which, in a natural and continuous sequence, produces damage and without which the damage would not have occurred.").

4. At trial and on appeal, American strongly disputed the position of Lloyd's expert, Dr. Stuart Harris, that this intelligent college student already living away from home would be incapable of gainful employment, even in a minimum wage job. *See* Pet. at 3.

albeit much less than would account for the $6.5 million award." Pet. App. at 15a. Given the amount of time that had passed since the June 1999 accident, and because the case was one of several on the multi-district docket, the Eighth Circuit offered Lloyd the option of accepting a remittitur for a final judgment of $1.5 million. Thereafter, the mandate issued, the $6.5 million judgment was reversed, and the case is now pending in the district court with no trial set.

REASONS FOR DENYING THE PETITION

Lloyd's Petition should be denied because she has failed to present any compelling reason justifying review of the question presented. Lloyd's two arguments for granting review are: (1) the decision below conflicts with *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996); and (2) review is necessary to complete the framework for recovery of mental injuries under the Warsaw Convention left open in *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991). However, as discussed below, neither is correct. In addition, there is no conflict among the circuits on the issue presented, and the Eighth Circuit's unanimous opinion here is consistent with all other circuits that have addressed the related question of liability for physical manifestations of mental injury, strongly suggesting that the question presented is premature for review at this time.

1. The Ruling Below Does Not Conflict with Existing Supreme Court Precedent.

Lloyd argues that the decision below conflicts with *Zicherman*, which applies a choice-of-law analysis to determine the law applicable to recoverable elements of

compensatory *damages* in a case governed by the Warsaw Convention. But the position Lloyd advocates, that any physical injury makes all mental injuries connected with the accident recoverable, would largely eviscerate *Floyd*. Most importantly, three years after *Zicherman*, this Court in *EL AL Israel Airlines, Ltd. v. Tseng* continued to cite *Floyd* as holding that "mental or psychic injuries unaccompanied by physical injuries are not compensable under Article 17 of the Convention" and further noted that "[t]he *Zicherman* case itself involved ancillary issues: who may seek recovery in lieu of passengers, and for what they may be compensated." 525 U.S. 155, 162, 170 (1999).

As seen below, *Zicherman* is unrelated to the question presented here; therefore, the decision below does not conflict with *Zicherman*.

A. *Floyd holds that mental injuries alone are not recoverable under the Warsaw Convention.*

The analysis begins, as it must, with *Floyd*, the leading case addressing recovery of mental injuries under the Convention. In *Floyd*, a plane's engines failed, the plane lost altitude, and the passengers were warned that the plane would crash. However, the engines restarted, and the plane landed safely. Although the passengers were not injured, they claimed damages for emotional distress. This Court reviewed the text and history of the Warsaw Convention and held that "an air carrier cannot be held liable under Article 17 [of the Convention] when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of

injury." *Id.* at 552.[5] However, the Court declined to express a view "as to whether passengers can recover for mental injuries that are accompanied by physical injuries." *Id.*

The question left open in *Floyd* was presented to the Eighth Circuit with three possible resolutions: (1) a carrier is not liable under the Convention for the recovery of mental injuries, even when accompanied by physical injury; (2) a carrier is liable for recovery of mental injuries to the extent proximately caused by physical injuries; or (3) a carrier is liable for all mental injuries provided that there is also some physical injury.[6]

As noted by the Eighth Circuit, the "more mainstream view," which it adopted, "is that recovery for mental injuries is

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5. Article 17 of the Warsaw Convention (translated into English from its original French text) reads as follows:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 U.S. Stat. 3018.

6. The plain language of the Warsaw Convention does not make an airline liable for mental injury. Article 17 enumerates the types of injuries that are a condition to liability: "death," "wounding," or "bodily injury"; it does not list "mental injury" or any of its characterizations (*e.g.*, emotional distress, psychological injury). As noted by the Eighth Circuit, American's position is that there is no liability for mental injuries under the Convention, or, in the alternative, mental injuries are recoverable only to the extent caused by physical injuries. *See* Pet. App. at 8a. Lloyd misstates American's position by omitting the first part of American's position. *See* Pet. at 9 n.3.

permitted only to the extent the distress is caused by the physical injuries sustained." Pet. App. at 9a; *see, e.g.*, cases cited at Pet. App. 9a-10a.[7] Thus, if a passenger sustained physical injuries that left him paralyzed or disfigured by burns (unlike here, where there were no significant permanent physical injuries), under the mainstream view the mental distress caused by those physical injuries would be fully recoverable. However, no damages are recoverable for the mental distress about the accident itself (similar to *Floyd*, where there was no liability for the fear that the aircraft would crash).

The minority view accepted by some district courts, that all mental injuries connected with the accident are recoverable provided that there is also some physical injury (*see, e.g.*, cases cited at Pet. App. 10a), undermines *Floyd* because passengers would be able to avoid the bar on recovery for solely mental injuries by alleging a remote or slight physical injury (*i.e.*, a passenger who cut his finger could recover for *all* mental injuries stemming from the accident while a passenger who escaped physical injury would be precluded from recovery).

The unanimous opinion of the Eighth Circuit expressly noted that its "approach is consistent with *Floyd*, yet provides full compensation for the victim within the bounds established by the Warsaw Convention." Pet. App. at 11a.

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7. Of course, unless Lloyd's physical injuries were caused by an "accident" under Article 17 of the Warsaw Convention, the issue of liability for physical or mental injuries is not reached. American, however, does not dispute that Lloyd's physical injuries were the result of an "accident" within the meaning of Article 17. *See, e.g., Air France v. Saks*, 470 U.S. 392, 405 (1985).

B. *Zicherman's choice-of-law analysis is inapplicable to Article 17 liability issues.*

Lloyd relies on *Zicherman* to argue the following: (1) she met the conditions for liability under Article 17 by virtue of the physical injuries to her calf and knee; (2) *Zicherman* requires application of Arkansas law to determine whether her mental injuries are recoverable; and (3) Arkansas law permits recovery for mental injury that accompanies physical injury (*i.e.*, Arkansas law does not provide that mental injury is recoverable only to the extent it "flows from" the physical injury).

Lloyd's argument is premised upon a misreading of *Zicherman* that radically departs from its holding, a holding that was confirmed by this Court in *Tseng*. 525 U.S. at 165 n.9. *Zicherman* holds that if the passenger meets the preconditions for *liability* under Article 17, the court should look to domestic law (the local law identified by the forum under its choice-of-law rules) to determine who may seek recovery and what *elements of damages* they may recover for the Article 17 injury or death at issue. 516 U.S. at 230. If, as in *Floyd*, the passenger does not meet the preconditions for liability under Article 17, the carrier cannot be *liable* for the injury in question, and the inquiry ends there. *Zicherman* and Arkansas law are irrelevant to this threshold question of whether the carrier is *liable* for a certain injury under Article 17, and the issue in this case turns solely on whether American is liable for the mental injury that Lloyd sustained. That question is governed by Article 17 of the Convention (*see Floyd*), not state law, and was the subject of the decision below.

Lloyd's misreading of *Zicherman* to require a choice-of-law analysis on whether a carrier is *liable* for a particular injury undermines the principal tenet of uniformity upon which the Warsaw Convention is based, as emphasized by this Court in *Zicherman* and *Tseng*. More importantly, it also confuses the concept of *elements of damages* recoverable for an Article 17 injury or death with the concept of *liability* to provide compensation for such injury or death. No one disputed below that a *Zicherman* choice-of-law analysis pointed to Arkansas damages law, provided that there was liability under Article 17 for the wounding or other bodily injury sustained. But, like *Floyd* and unlike *Zicherman*, recovery for mental injuries involves the threshold issue of whether a carrier is *liable* for that type of injury under Article 17 of the Convention.

Significantly, the Court in *Floyd* used the phrase "Article 17 injuries" and never suggested that whether there is *liability* for mental injuries in a Warsaw case differs case-by-case depending on a choice-of-law analysis.[8] Instead, after looking to the French text, drafting history, and

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8. As this Court stated in *Tseng*:

> The cardinal purpose of the Warsaw Convention, we have observed, is to "achieve uniformity of rules governing claims arising from international air transportation." . . . Given the Convention's comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations.

525 U.S. at 169 (citations omitted).

post-ratification conduct of the parties, the Court in *Floyd* construed the question of recovery for mental injury as purely an Article 17 issue of *liability*. Not surprisingly, Lloyd cites no case to the contrary.

The *liability* versus *elements of damages* distinction regarding mental injuries is analogous to that for punitive damages. Rather than conducting a choice-of-law analysis, every circuit addressing the issue holds that, regardless of local law, there is no liability for punitive damages under the Convention *even when there is a physical injury that satisfies the Article 17 conditions of liability.*[9] *See, e.g., Carey v. United Airlines*, 255 F.3d 1044, 1050 (9th Cir. 2001); *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 142 (2d Cir. 1998); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1485-90 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991); *cf. Dazo v. Globe Airport Sec. Servs.*, 268 F.3d 671, 680-81 (9th Cir. 2001); *In re Air Crash Off Point Mugu, Cal., on Jan. 30, 2000*, 145 F. Supp. 2d 1156, 1158 (N.D. Cal. 2001). In other words, where there is no liability under Article 17 for a type of damage or injury (*e.g.*, punitive damages or mental injury alone), it is irrelevant that local law would allow recovery.

Zicherman itself contains no suggestion that it altered the holding in *Floyd*. Indeed, three years after *Zicherman*, this Court in *Tseng* continued to refer to *Floyd's* holding that there is no liability for solely mental injuries under the Convention and never suggested that *Zicherman* modified *Floyd*. 525 U.S. at 165 n.9. The issue before the Court in *Tseng* was: "When the Convention allows no recovery . . .

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9. Lloyd withdrew her cross-appeal to the Eighth Circuit from the denial of punitive damages.

does it . . . preclude the passenger from maintaining an action for damages under another source of law, in this case, New York tort law?" *Id.* at 160. This Court addressed whether Ms. Tseng was permitted to pursue a claim under New York state law because she did not meet the Article 17 pre-conditions to liability ("accident" and "wounding or other bodily injury") after she was searched as part of what she claimed to be an intrusive security screening. This Court held that the "Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not *satisfy the conditions for liability under the Convention*." *Id.* at 176 (emphasis added).

Tseng declined to read *Zicherman* to allow a state-law claim where recovery under the Convention was barred because plaintiff did not meet the Article 17 conditions for liability:

> Looking to the Convention's text, negotiating and drafting history, contracting states' postratification understanding of the Convention, and scholarly commentary, the Court in *Zicherman* determined that ***Warsaw drafters intended to resolve whether there is liability***, but to leave to domestic law (the local law identified by the forum under its choice-of-law rules or approaches) determination of the compensatory damages available to the suitor.

525 U.S. at 170 (emphasis added). Thus, local law (as selected by a *Zicherman* analysis) determines the recoverable elements of damages (*e.g.*, grief, pain and suffering, loss of consortium, and loss of society), but, as recognized in *Floyd*, Article 17

of the Convention determines the threshold issue of whether there is liability for that type of injury.[10]

Floyd, not *Zicherman*, is implicated by the question presented. And, as discussed above, the Eighth Circuit's decision in this case adopted an approach that is "consistent with *Floyd*" by requiring that the mental injuries be proximately caused by the physical injuries to meet the liability threshold under Article 17. Pet. App. at 11a.

On the other hand, the position advocated by Lloyd that any physical injury makes all mental injuries recoverable would largely eviscerate *Floyd*. It flies in the face of *Floyd* to allow minor physical injuries, which themselves caused no mental injuries, to become a key that opens the gates for recovery of emotional distress over the accident itself. Whereas recovery for mental injuries was disallowed in both *Floyd* and *Tseng*, under Lloyd's approach a small cut or scratch to the plaintiffs in those cases would have resulted in recovery for all of their mental injuries. That would lead to the type of "artful pleading" criticized by this Court in *Tseng*. 525 U.S. at 171. The decision below is a logical extension of *Floyd* and ensures that recovery for mental injury, if allowed at all, is limited to mental injuries arising from an Article 17 bodily injury.

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10. Indeed, if Lloyd is correct that the decision below conflicts with *Zicherman* (which it does not), Lloyd would not need to argue that this Court should now address the question left open in *Floyd*. In other words, it is inconsistent for Lloyd to argue simultaneously that a need exists to resolve the question left open in *Floyd* and that *Zicherman* has already resolved the question in Lloyd's favor. Again, if a carrier is not liable for the types of damages or injuries at issue under Article 17 (*see Floyd*), the *Zicherman* choice-of-law analysis is not reached.

Lloyd argues vigorously that the Eighth Circuit's result creates an unacceptable disparity between recoveries available to domestic passengers under Arkansas law and to international passengers under the Warsaw Convention. Pet. at 11. This argument in equity is without merit. The cardinal purposes of the Warsaw Convention were to create uniform rules for claims arising out of international transportation, to limit the then fledgling aviation industry's potential liability for claims of personal injury or death, and to avoid the application of varying local laws. *See In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267, 1270 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991), *citing* Andreas F. Lowenfeld & Allen I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-99 (1967). The Convention was not intended to provide a remedy for every wrong, even if otherwise available to domestic passengers.

As *Floyd*, *Zicherman*, and *Tseng* all make clear, the primary purpose of uniformity is not advanced when courts apply the differing domestic *liability* laws of states. Those decisions do not require the uniform treatment of domestic and international passengers involved in an accident. In fact, this Court implicitly, if not expressly, rejected the inequitable remedy argument when Ms. Tseng was left without a remedy. This Court properly held that Ms. Tseng was precluded from recovery under state law because the Warsaw Convention was her exclusive cause of action, and this Court also recognized that Ms. Tseng was precluded from recovery under the Warsaw Convention because she failed to meet the preconditions for liability under Article 17. *See Tseng*, 525 U.S. at 172.

Accordingly, Lloyd's efforts to manufacture a conflict between the decision below and the decisions of this Court do not withstand analysis.

2. The Decision Below Does Not Conflict with the Decision of Any Other United States Court of Appeals and, on a Related Issue, Is Consistent with Every Circuit that Has Addressed that Issue.

Simply stated, there is no conflict among the circuits on the question presented. No other circuit court has squarely addressed whether there is liability for mental injury under Article 17 of the Convention when a passenger has also sustained a physical injury. The unanimous decision below follows the "more mainstream view" (Pet. App. at 9a), and a district court in another circuit has already followed the Eighth Circuit's lead. *See Ehrlich v. American Airlines, Inc.*, No. 99-CV-6013, slip op. at 8 (E.D.N.Y. June 21, 2002) (App. at 8a). ("The Court finds the reasoning and conclusions of the *Little Rock* court and the district courts previously cited persuasive. Under the Warsaw Convention, a plaintiff may only recover for emotional damages caused by physical injury.").[11]

It is significant to note that the Third and Ninth Circuits have addressed the related issue of whether emotional distress is recoverable under Article 17 if there is no physical injury but the distress resulted from "physical manifestations" such as nausea, sleeplessness, etc. *See Carey*, 255 F.3d at 1051-52; *Terrafranca v. Virgin Atlantic Airways, Ltd.*, 151 F.3d 108, 111-12 (3d Cir. 1998). Both concluded that physical manifestations of emotional distress are ***not*** sufficient to meet

11. A copy of the decision is reprinted in American's appendix at pages 1a-10a.

the bodily injury requirement for liability under Article 17. *See id.* The Eighth Circuit's decision below expressly adopted the views of the Third and Ninth Circuits on that issue, adding to the consistent treatment among the circuits. *See* Pet. App. at 15a ("we agree with the reasoning in *Carey* and *Terrafranca*").

3. Review Is Not Necessary to Complete the Framework for Recovery of Mental Injuries under the Warsaw Convention, and the Question Presented Is Not One of Substantial Importance Warranting Consideration.

Lloyd argues that the question presented will "complete the basic framework for recovery of damages for mental injuries in international air travel begun by the Court in *Floyd*." Pet. at 5. However, it is not this Court's responsibility to devote its limited resources to "complete the basic framework." *See* Sup. Ct. R. 10(a). Because there is no division among the circuits and no conflict with existing Supreme Court precedent, the question presented is premature for review. The question presented is not like other Convention issues that warranted review due to a significant conflict among the circuits. *See, e.g.*, *Tseng*, 525 U.S. at 161 n.3 (noting a direct conflict among the Second, Third, and Fifth Circuits on the exclusivity issue); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 125 (1989) (noting that certiorari was granted because there was a conflict among the District of Columbia, Second, and Fifth Circuits).

When an issue is not otherwise appropriate or necessary for review and determination, the fact that a resolution of the question might contribute to "completing the basic framework" of Warsaw Convention recovery does not make the issue ripe before its time. *Cf. Wallace v. Korean Air*, 214

F.3d 293 (2d Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001) (declining to review whether a passenger-to-passenger sexual assault constitutes an Article 17 accident); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) (declining to review the recoverability of punitive damages under the Convention); *Floyd*, 499 U.S. at 552-53 (declining to review question of liability under Article 17 for mental injuries accompanied by physical injury and exclusivity question); *Saks*, 470 U.S. at 408 (declining to review exclusivity question).[12]

Lloyd seems to suggest that, as a result of *Tseng*, the question presented is timely for review. *See* Pet. at 5-7. *Tseng* did resolve the exclusivity issue expressly left open in *Floyd*, but, as noted above, the case resolved a direct conflict among three circuits on that issue. There is nothing in *Tseng* to suggest that the second question left open in *Floyd*, as to which there is still no conflict among the circuits, is now appropriate for review.

Consequently, Lloyd has failed to demonstrate that the question presented is ripe for review or is of such substantial importance to warrant review.

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12. Additional ripeness considerations also militate against review. Until the proceedings in the district court are complete, there will not be a full record on what mental injuries, if any, Lloyd has sustained as a result of her Article 17 bodily injuries. Furthermore, the Eighth Circuit found that the district court failed to conduct a proper *Daubert* analysis of the evidence concerning mental injuries. *See* Pet. App. at 19a. Thus, this case itself is not ripe for review by this Court. *See Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

CONCLUSION

For all of the foregoing reasons, American respectfully requests that this Court deny Lloyd's Petition for a Writ of Certiorari.

Respectfully submitted,

RANDAL ROBERT CRAFT, JR.
Counsel of Record
ALAN DAVID REITZFELD
JOANNA L. GERAGHTY
HOLLAND & KNIGHT LLP
195 Broadway
New York, NY 10007
(212) 513-3200

GEORGE LUCAS ASHLEY
JOHN HARRIS MARTIN
THOMPSON & KNIGHT LLP
1700 Pacific Avenue
Suite 3300
Dallas, TX 75201
(214) 969-1700

Attorneys for Respondent

APPENDIX

APPENDIX — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JUNE 19, 2002 AND FILED JUNE 21, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

99-CV-6013 (CBA)

GARY EHRLICH and MARYANNE EHRLICH,

Plaintiffs,

–against–

AMERICAN AIRLINES, INC., AMERICAN EAGLE AIRLINES, INC., and SIMMONS AIRLINES, INC.,

Defendants.

AMON, UNITED STATES DISTRICT JUDGE:

INTRODUCTION

Plaintiffs filed this action seeking recovery for bodily and mental injuries sustained in an aircraft landing accident. Defendants filed a motion for partial summary judgment on the grounds that plaintiffs' emotional injuries are not compensable under the Warsaw Convention. For the reasons set forth below, defendants' motion is granted.

Appendix

BACKGROUND

On May 8, 1998, plaintiffs were passengers on American Eagle Flight No. 4925, from Baltimore, Maryland to JFK. Plaintiffs were scheduled to connect to a flight to London. The aircraft on which plaintiffs were traveling had an abnormal landing. The plane landed at a high rate of speed, continued beyond the runway, and stopped on an arrestor bed. The passengers were evacuated from the aircraft by jumping six to eight feet from the doorway. During the landing, both of Mr. Ehrlich's knees were injured. Mrs. Ehrlich alleges that she sustained injuries to her upper extremities, right knee, back, shoulder, and hips and has developed hypertension and cardiac changes.

Plaintiffs' complaint alleges that they both suffer from emotional injuries, including fear of flying and bad dreams. Plaintiffs have put forth some evidence of their emotional injuries in their depositions. Mr. Ehrlich testified that he wakes up in the middle of the night recalling the incident.[1]

---

1. Mr. Ehrlich's deposition states the following:

Q: How long has that happened to you?

A: A couple of times a month?

Q: Is that related at all to your knee injuries?

A: No.

Q: Tell me what happens?

(Cont'd)

Mrs. Ehrlich also testified that she "wake(s) up a lot during the night" thinking about the accident, and that this is related to the fear experienced during the actual incident.

This Court heard oral argument on defendants' motion for partial summary judgment and granted plaintiffs' cross-motion for summary judgment on the issue of liability under the Intercarrier Agreement of 1996. It reserved decision on defendants' motion for partial summary judgment.

(Cont'd)

> A: I wake up thinking that I am sort of trapped in the plane and either there is going to be a fire or I am going to go into the water ....
>
> Q: Is it related to the fear you experienced during the actual incident?
>
> A: Correct. I would say that it was some sort of flashback.
>
> Q: Do you plan on having any type of psychological treatment for this?
>
> A: No.
>
> Q: Has it affected your daily living at all?
>
> A: No.

Affidavit of Lewis Silverman, Ex. F, Deposition of Gary Ehrlich at 110-112.

Appendix

DISCUSSI0N

A. *The Warsaw Convention*

Ratified by the United States Senate in 1934, the Warsaw Convention governs air carrier liability for harm to passengers on international flights. Article 17 of the Warsaw Convention states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Convention for Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, *reprinted in note following* 49 U.S.C.A. § 40105. The Warsaw Convention provides the exclusive remedy for injuries arising out of international aircraft accidents. *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 161 (1999). The parties do not dispute that the landing and evacuation in this case constitute an accident as defined by the Warsaw Convention.

Defendants argue that plaintiffs have not proven that they sustained any emotional or psychological injuries and that even if this Court finds that mental injuries have been established, plaintiffs may not recover because they have not established a causal link between the physical injuries they

sustained and the mental injuries. Plaintiffs counter that they can show provable mental injuries, and that there is no requirement to establish a nexus between the emotional and physical injuries to recover under the Warsaw Convention.

B. *Recovery for Emotional Injuries Under the Warsaw Convention*

It is well-settled that in order to recover for any injuries arising out of an accident under the Warsaw Convention, a plaintiff must sustain physical injuries. *See Eastern Airlines v. Floyd*, 499 U.S. 530, 552 (1991). What is less clear is the extent to which a plaintiff may recover for emotional injuries if she also sustains physical injuries. Courts have come to different conclusions regarding whether emotional injury accompanied, but not caused, by physical injury is compensable under the Warsaw Convention. *Compare, e.g., In re Aircrash Disaster Near Roselawn, Indiana*, 954 F. Supp. 175 (N.D. Ill. 1997) (permitting recovery for preimpact fear unrelated to bodily injury), *with Wencelius v. Air France*, 1996 WL 866122 (C.D. Cal. 1996) (dismissing claims for emotional distress unrelated to bodily injury).

Substantial and persuasive authority exists among courts in this Circuit as well as others for the position that damages for emotional distress are permitted only to the extent that the emotional distress is caused by bodily injury. *See, e.g., In re Air Crash at Little Rock. Arkansas*, No. 01-1047, 2002 WL 1059718 (8th Cir. May 29, 2002); *Ligeti v. British Airways PLC*, No. 00 Civ. 2936 (FM), 2001 WL 1356238 (S.D.N.Y. Nov. 5, 2001); *Alvarez v. American Airlines, Inc.*, No. 98 Civ. 1027 (MBM), 1999 WL 691922 (S.D.N.Y. Sept. 7,

1999); *Longo v. Air France*, No. 95 CV 0292 BDP, 1996 WL 866124 (S.D.N.Y. Jul. 25, 1996); *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 (N.D. Cal. 1994). This Court adopts that rule in this case.[2]

One rationale underlying these courts' requirement of a causal nexus between the physical and emotional harm is that it prevents great inequities among the passengers subject to the Warsaw Convention. "The happenstance of getting scratched on the way down the evacuation slide [should] not enable one passenger to obtain a substantially greater recovery than that of an unscratched co-passenger who was equally terrified by the plane crash." *Jack*, 854 F. Supp. at 667. If the opposite rule were to be adopted, plaintiffs would be able to skirt the bar on recovery simply by alleging that they suffered a slight or remote physical injury. *Alvarez v. American Airlines*, 1999 WL 69122, *3 (S.D.N.Y. 1999).

Additionally, this rule is more consistent with the Supreme Court's ruling in *Eastern Airlines v. Floyd*. In *Floyd*,

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2. Plaintiffs rely on the Minutes of the International Conference on Air Law held in Montreal, Canada in May, 1999, which culminated in the signing of the Montreal Convention, for the proposition that the position taken by this Court is the minority position. However, the Montreal Convention has not been ratified; an unratified treaty has no force until ratified by a two-thirds vote of the Senate. *See SEC v. Int'l Swiss Investments Corp.*, 895 F.2d 1272 (9th Cir. 1990). Moreover, the minutes indicate a lack of consensus on what harms should be recoverable and suggest that the present interpretation of the Warsaw Convention requires a link between mental and physical injury and does not allow compensation for fear of flying. *See* Docket entry # 29, Addendum, Ex. A, International Conference on Air Law, Minutes, 69, 111.

the Court determined that an aircraft carrier is not liable for purely mental injuries under Article 17 because such injury does not fit within the meaning of "bodily injury." *See* 499 U.S. at 534. Although *Floyd* left open the question in this case, "whether passengers can recover for mental injuries that are accompanied by physical injuries," *id.* at 552, permitting recovery for psychological damages that are unrelated to physical injuries caused by an accident would eviscerate the rule in *Floyd*; it would permit recovery for purely psychological damage caused by an accident. As the district court concluded in *Longo*, a claim for mental distress that does not flow from physical injury is "no different for the pure mental injury claims proscribed by *Floyd*." 1996 WL 866124, at *2.

The Eighth Circuit, the only court of appeals to consider this issue, has recently adopted the rule the Court applies here. It concluded that permitting recovery only for emotional damages that are caused by physical injury was most consistent with the Supreme Court's ruling in *Floyd*. Reversing the district court, which had concluded that the physical injury requirement of *Floyd* was merely a prerequisite to recovering for mental injury, the Eighth Circuit stated "allowing a physical injury, no matter how minor or unrelated, to trigger recovery of any and all post-crash mental injuries would violate both the letter and spirit of *Floyd*." *In re Air Crash at Little Rock*, 2002 WL 1059718, at *4. Accordingly, it concluded that "under the *Floyd* interpretation of the Warsaw Convention, we must draw a line between mental injuries flowing from physical injuries suffered in the crash and mental injuries directly caused by the accident." *Id.* at *5. In line with this rule, the *Little Rock* court reduced

a jury verdict, finding that the "evidence at trial was simply not sufficient to establish a $6.5 million connection between [the plaintiff's] relatively insignificant physical injuries and her very significant PTSD and depression." *Id.*

Plaintiffs argue that notwithstanding these courts' holdings, they may recover damages for their emotional injuries based on the Supreme Court's holding in *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996). This argument is not persuasive. *Zicherman* determined whether relatives of a passenger who died in a plane crash could recover for loss of society under the Warsaw Convention. The Supreme Court concluded that a carrier's liability for "damage sustained" extended only to "legally cognizable harm," as prescribed by a forum's substantive law. *Id.* at 224, 231. Plaintiffs argue that this holding controls the outcome in this case, and that this Court should look to New York substantive law to determine whether they may recover for their emotional injury from the accident. *Zicherman*'s holding, however, is not dispositive of this case because the "damages sustained" by the Zichermans clearly arose out of the death or bodily injury of their deceased relative. *Zicherman* in no way abrogated *Floyd* or the reasoning of the *Little Rock* court or others cited herein. Under *Zicherman*, this Court would turn to the substantive law of the forum state to determine whether mental pain and suffering arising from the Ehrlichs' physical injuries would be compensable.

The Court finds the reasoning and conclusions of the *Little Rock* court and the district courts previously cited persuasive. Under the Warsaw Convention, a plaintiff may only recover for emotional damages caused by physical injuries.

C. *Analysis of Injuries*

Summary judgment may be granted where, as here, there is no genuine issue as to any material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Eastman Mach. Co. v. United States*, 841 F.2d 469, 473 (2d Cir. 1988). Plaintiffs have not raised a genuine issue of fact regarding a causal connection between their alleged bodily injuries and their mental suffering. Both plaintiffs complain of a fear of flying and of having bad dreams. However, both plaintiffs acknowledge in their depositions that these mental harms stem from the landing and evacuation itself, not from their physical injuries. Simply put, plaintiffs have offered no evidence demonstrating a causal connection between the alleged injuries. Therefore, defendants' motion for partial summary judgment is granted and plaintiffs may not recover for their emotional trauma resulting solely from the aberrant landing and evacuation.

CONCLUSION

For the reasons set forth above, defendants' motion for partial summary judgment is granted.

SO ORDERED.

Dated: Brooklyn, New York
June 19, 2002

s/ Carol Bagley Amon
Carol Bagley Amon
United States District Judge